Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	**)**
	)
Complaints against ACC Licensee, LLC,	**)**
Licensee of Station WJLA-TV, Washington,	**)**
D.C., and Sander Media, LLC, Licensee of	**)**
Station KGW(TV), Portland, OR	**)**

APPLICATION FOR REVIEW

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Dated: October 2, 2014

Summary

The Campaign Legal Center, Common Cause, and the Sunlight Foundation ask that the full Commission reverse the Media Bureau's September 2, 2014, decision to dismiss complaints filed against WJLA-TV and KGW(TV). Each station received payment from Super PACs to broadcast political advertisements. These Super PACs received essentially all their funding from a single donor, making that person the "true sponsor" of the advertisement. However, neither station disclosed on-air the name of that single donor, thus violating the Communications Act and the Commission's rules, and deprived the public of the right to know by whom it is being persuaded.

The Complaints alleged that the stations did not exercise "reasonable diligence" as required by Section 317 of the Communications Act to ensure that their on-air disclosure complied with the sponsorship identification rules. Complainants argued that the statutorily-imposed reasonable diligence standard places a duty on broadcasters to investigate a political advertisement's sources of funding to properly disclose the true identity of that advertisement's sponsor. Complainants further showed that information necessary to make the correct on-air disclosure was readily available in numerous news articles, in Federal Elections Commission disclosure reports, and in WJLA's case, in the news department of its own station.

The Bureau dismissed the Complaints, claiming they did not show the stations had credible evidence that the true sponsor was someone other than the group identified. It also stated it may have taken a different approach if Complainants had first furnished its evidence to the stations directly.

The Bureau's dismissal was in error. Section 317's plain language, as well as the long history of Commission interpretation and enforcement of Section 317, establishes that broadcasters must take steps to ascertain the true sponsors of political advertisements. The Communications Act and the Commission's rules explicitly place the reasonable diligence

requirement on broadcasters, not the public. Commission rules further place the burden of disclosing on-air the "true identity" of political ad sponsors on the broadcasters, not the public. However, in its decision, the Bureau shifted the broadcasters' burden of reasonable diligence to the public, releasing broadcasters from any obligation. The Communications Act, Commission precedent, nor the Commission's rules support the Bureau's assertion that the public *must* notify stations before filing with the Commission.

The Bureau also stated it exercised its discretion not to enforce the rule because of the need to balance the reasonable diligence requirement with "sensitive" First Amendment interests. This was also incorrect. The Bureau failed to recognize that broadcasters have no First Amendment rights at stake in complying with content-neutral disclosure requirements. Rather, it is the public's "paramount" First Amendment right to be informed which is implicated here.

The full Commission must overturn the Bureau's action and address the Complaints on the merits. It should clarify that the public is not required to present evidence to the station prior to filing with the Commission, and then must state clearly that the First Amendment interests of the public are paramount and do not provide a safe haven for broadcasters to obscure true funding sources of political ads.

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APPLICATION FOR REVIEW

The Campaign Legal Center, Common Cause, and the Sunlight Foundation, by their attorney, the Institute for Public Representation, pursuant to 47 CFR §1.115, respectfully request that the full Commission review and reverse the Letter issued by the Media Bureau on September 2, 2014, dismissing their complaints against two television stations for violating Section 317 of the Communications Act and FCC rules concerning sponsorship identification of political advertisements.

I. Questions Presented

> 1. Did the Media Bureau's determination that broadcasters have no duty to exercise reasonable diligence to identify the true sponsor of a political advertisement unless a complainant has furnished "credible, unrefuted evidence that a sponsor is acting at the direction of a third party" conflict with Section 317 of the Communications Act, Commission rules, or Commission policy?
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> 2. Did the Media Bureau err in assuming that requiring broadcasters to exercise reasonable diligence implicated "sensitive First Amendment interests"?

II. Background

A. The Complaints

On July 17, 2014, the Campaign Legal Center, Common Cause, and the Sunlight Foundation filed complaints against the licensees of two broadcast stations under Section 317 of

the Communications Act for not exercising reasonable diligence to identify the true identity of the sponsors of political advertisements. The first complaint was against WJLA-TV in Washington D.C. for failing to identify Tom Steyer as the true sponsor of political advertisements paid for by the NextGen Climate Action Committee ("NextGen") attacking Virginia Gubernatorial candidate Ken Cuccinelli. The second complaint was against KGW in Portland, OR for failing to identify Sean Fieler as the true sponsor of political advertisements paid for by the American Principles Fund ("APF") to support Jason Conger in the 2014 Oregon Republican Senatorial primary election.

The complaints showed that Steyer and Fieler were the true sponsors of the advertisements because they founded and contributed all or nearly all the funds to each Super PAC. The complaints also showed that this information was readily available in multiple online sources at the time the advertisements aired. Furthermore, in WJLA's case, before airing the NextGen advertisements, station employees had researched and broadcast a story stating that Steyer would be making major advertising purchases in Virginia to support the McAuliffe campaign. Neither Steyer nor Fieler was disclosed on-air as the sponsor of their respective Super PAC's advertisements, thus violating the requirement that advertisements disclose the true sponsor of the advertisement.

B. The Media Bureau response

The Media Bureau issued a two-paragraph letter dismissing the complaints on September 2, 2014.[1] The Bureau concluded that the complaints did "not provide a sufficient showing that the stations had credible evidence casting into doubt that the identified sponsors of the advertisement were the true sponsor."[2] Next, the letter notes that "[a]s the Commission has

[1] Letter from Robert L. Baker, Assistant Chief, Policy Division, Media Bureau, to Andrew Jay Schwartzman, Institute for Public Representation, Sept. 2, 2014, DA 14-1267 ("Letter").
[2] *Id.* at 1.

stated previously, 'unless furnished with credible, unrefuted evidence that a sponsor is action at the direction of a third party, the broadcaster may rely on the plausible assurances of the person(s) paying for the time that they are the true sponsors.'"[3]

The Bureau acknowledges that the complaint against WJLA had provided "some evidence that station employees of WJLA may have come across facts in the course of news reporting . . . that could have raised questions . . . concerning the relationship of NextGen Climate Action Committee and Tom Steyer."[4] Nonetheless, the Bureau decided to "exercise our discretion not to pursue enforcement in this instance, given the need to balance the 'reasonable diligence' obligations of broadcasters in identifying the sponsor of an advertisement with the sensitive First Amendment interests present here."[5] It does not explain what the First Amendments interests might be.

Finally, the Bureau stated that "[o]ur approach might have been different if the complainants had approached the stations directly to furnish them with evidence calling into question that the identified sponsors were the true sponsors."[6]

III. The full Commission should reverse the Bureau's dismissal of the complaints.

The Commission should overturn the Media Bureau's letter for two reasons. First, Section 317 of the Communications Act requires *broadcasters* to exercising reasonable diligence to identify the true sponsors of paid advertisements and to identify the sponsor on-air. The Bureau's letter instead places the burden on the *viewing public* to investigate the identity of true sponsor and present evidence to the broadcaster. Second, in exercising its discretion not to

[3] *Id.* (citing *Trumper Communications of Portland*, LTD, 11 FCC Rcd 20415 (MMB 1996)).
[4] *Id.* In fact, the Complaint against WJLA alleged that WJLA ran a story prior to NextGen's arrival in Virginia that indicated Tom Steyer planned to inject substantial sums of money into the Virginia gubernatorial election. *Complaint against WJLA filed by the Campaign Legal Center, et al.*, filed July 17, 2014, at 8-10.
[5] Letter at 1.
[6] *Id.*

pursue enforcement, the Bureau ignored the fact that the only First Amendment interest present in these complaints is the interest of the public in knowing who is paying for political advertisements, and that interest weights in favor of enforcing the law.

A. The Media Bureau incorrectly applied the reasonable diligence standard.

Full Commission review is warranted when a Bureau action is "in conflict with statute, regulation, case precedent, or established Commission policy."[7] The Communications Act, Commission regulations, and established Commission policy all require broadcasters to exercise reasonable diligence to identify and disclose the party paying for an advertisement. However, the Bureau suggests that it need not act on a complaint alleging violation of the sponsorship identification statute and rules unless members of the public identify the true sponsor of a political advertisement and present "credible, unrefuted evidence" that the party paying for the ad is not the true sponsor. This is incorrect. As explained below, the statute and Commission rule and policy place the burden of investigation on the broadcaster and impose no obligation on the public to first complain to the broadcaster.

1. The Communications Act and implementing regulations expressly place the reasonable diligence requirement on broadcast stations, not the public.

Section 317 requires that any advertisement that a broadcast station is directly or indirectly paid to air shall announce at the time of broadcast that the advertisement is "paid for or furnished, as the case may be, by such person."[8] Section 317 further requires a broadcast licensee to exercise "reasonable diligence" to "obtain from its employees, and from *other persons* with whom it deals directly in connection with [the advertisement], information to enable" the broadcaster to accurately identify the advertisement's sponsor.[9] These requirements are to ensure that the public is "know[s] by whom they are being persuaded."[10]

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[7] 47 CFR §1.115(b)(2)(i).

[8] 47 USC §317(a)(1).

[9] 47 USC §317(c) ("The licensee of each radio station shall exercise reasonable diligence to

Section 73.1212 of the Commission's regulations mirrors the statutory language and states that the on air sponsor identification shall "fully and fairly disclose the true identity" of the person or entity paying for the advertisement.[11] In addition, Section 73.1212(e) requires that:

> Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known *or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station*, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent.[12]

The Commission added the italicized language in 1975 to strengthen the sponsorship identification rule in the wake of a federal court decision that had overturned a Commission-imposed forfeiture on a station that failed to identify the true sponsor of a television program about candidate for governor.[13] NBC objected that the language "would place an impossible burden on the licensee because it will no longer be able to accept at face value a statement that a group is a sponsor if on hindsight the Commission could decide that the licensee should have known who the real party in interest was."[14] The Commission's rejected NBC's concerns, noting that language was

> inserted in proposed paragraph (e) to stress the importance of attempting to ascertain the true identity of a party on whose behalf payment is being made, and was meant to be understood . . . 'by the exercise of reasonable diligence as specified in paragraph (b) should be known.' Although it may be argued that placing such

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obtain from its employees, and from *other persons* with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.") (emphasis added).

[10] *Applicability of Sponsorship Identification Rules*, 40 FCC 141, 141 (1963).

[11] 47 CFR §73.1212(e).

[12] *Id.* (emphasis added).

[13] *Amendment of the Comm'n's "Sponsorship Identification" Rules*, 52 FCC 2d 701 (1975). The rulemaking was initiated in 1972 in response *US v. WHAS, Inc.*, 253 F. Supp. 603 (W.D. Ky. 1966), *aff'd* 385 F.2d 784 (6th Cir. 1967). *See* 52 FCC 2d at 702-03.

[14] 52 FCC 2d at 706-07.

> language in paragraph (e) when a reasonable diligence standard already exists in paragraph (b) is redundant, we are of the view that *the importance of emphasizing the duty of licensees to look beyond ostensible sponsors warrants such repetition.*[15]

The Commission added:

> [We] find it difficult to believe that these policies add significantly to the overall administrative burdens involved in operating a broadcast station. It is obvious that any form of governmental regulation will impose certain costs or burdens of administration on the industry affected. The point is not whether some burden is involved, but rather whether that burden is justified by the public interest objective embodied in the regulation. Broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public's paramount right to be informed, some administrative burdens must be imposed on the licensee in this area. These burdens simply 'run with the territory.' [16]

Therefore, both the Communications Act and Commission rules mandate that broadcasters seek sponsorship identification information from a buyer before airing an advertisement and exercise reasonable diligence to ensure that the named sponsor is the actual party paying for the advertisement.

The Bureau's action here is inconsistent with the plain language of the Communications Act and the regulation. The Bureau asserts that as a prerequisite to enforcing Section 317, members of the public must present evidence directly to a broadcaster that a political advertisement violates the sponsor identification requirement. But no such requirement is contained in either the law or the regulations. By imposing this prerequisite, the Bureau has excused broadcasters from their statutory and regulatory duty to obtain sponsorship information and transferred this duty to members of the public. In essence, the Bureau has decided that "reasonable diligence" is no diligence at all. Therefore, the Bureau letter is contrary to statutory requirements and Commission regulations and must be overturned by the full Commission.

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[15] *Id.* (emphasis added).

[16] *Amendment of the Comm'n's "Sponsorship Identification' Rules*, 52 FCC 2d at 709.

2. Established Commission policy requires that broadcasters take investigatory action in exercising reasonable diligence to ensure that the sponsor identification requirement is met.

In addition to being contrary to the language of the statute and regulation, the Bureau's letter adopts a position that is contrary to established policy of the full Commission interpreting and applying the reasonable diligence standard.

Longstanding Commission opinions and guidance hold that in the context of political messages, the exercise of reasonable diligence requires that broadcast stations investigate a buyer's source of funding. As far back as 1946, in response to a request for interpretation, the Commission stated that in certain situations the exercise of reasonable diligence requires that a broadcast station "make an investigation of the source of the funds to be used for payment."[17] In a 1958 notice finding that a Minnesota television station had failed to exercise reasonable diligence, the Commission stated that when a station is paid to broadcast messages of a political matter, "the highest degree of diligence is called for in ascertaining, *before the presentation* thereof, the *actual source* responsible for furnishing the material."[18] The Bureau's statement that a broadcaster need not undertake any investigation so long as no third party has provided compelling evidence that the purchaser of an advertisement is not the true sponsor of that advertisement, is contrary to this precedent.

The only precedent cited by the Bureau does not actually support its action here. The Bureau cited to a 1996 Bureau letter, *Trumper Communications of Portland, LTD*.[19] The

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[17] *Albuquerque Broadcasting Co.*, 40 FCC 1, 1 (1946) ("As to what may be reasonable depends, of course, upon the circumstances in each case. For example, if a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of the funds to be used for payment.").

[18] *Violation of Section 317 of the Commc'ns Act.*, 40 FCC 12, 14 (1958) ("[T]he Commission wishes to emphasize that in connection with material constituting a 'discussion of public controversial issues' or a *political discussion*, the highest degree of diligence is called for in ascertaining, *before the presentation* thereof, the *actual source* responsible for furnishing the material. ") (emphasis added).

[19] 11 FCC Rcd 20415, 20417 (MB 1996).

complaint at issue in *Trumper* alleged that advertising opposing an Oregon ballot proposition that would have raised taxes on tobacco products identified as paid for "Fairness Matters to Oregonians Committee" should have identified the Tobacco Institute as the true sponsor. The Bureau contacted each station by telephone for a response. After considering the evidence presented in the complaints and the responses of the stations, the Bureau concluded that "in these specific circumstances, identification of the Tobacco Institute as the true sponsor is required by the statute and our rules."[20]

Ignoring the overall import of *Trumper*, the Bureau quotes a passage from the letter stating that "unless furnished with credible, unrefuted evidence that a sponsor is acting at the direction of a third party, the broadcaster may rely on the plausible assurances of the person(s) paying for the time that they are the true sponsors."[21] Yet in this case, the Bureau has not ascertained what if any assurances were given to the stations, much less whether they were plausible. Moreover, the Bureau acknowledges that there "may be cases where a challenger makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor that the licensees, in the exercise of reasonable diligence, would have to inform the named sponsor that they could not broadcast the message without naming another party."[22] However, the Bureau made no effort to assess whether either complaint made a strong circumstantial case.

In sum, the Commission should reverse the Bureau's dismissal of the complaints because the dismissal is in conflict with Section 317 of the Communications Act, Section 73.1212 of the Commission's rules, and longstanding cases interpreting those provisions.

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[20] 11 FCC Rcd at 20418.
[21] Letter at 1.
[22] *Id.* at n. 1 (citing *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983)).

B. The only First Amendment interests in these Complaints supports requiring broadcasters to make efforts to identify the true sponsor of paid political advertisements.

In dismissing the complaints, the Bureau stated that "we exercise our discretion not to pursue enforcement in this instance, given the need to balance the 'reasonable diligence' obligations of the broadcasters in identifying the sponsor of an advertisement with the sensitive First Amendment interests present here."[23] The Bureau did not elaborate on these supposedly "sensitive" First Amendment interests.

The Bureau does not, nor could it, claim that requiring on-air disclosure of the true identity of sponsors of political advertisements violates the First Amendment. Sponsorship identification requirements are content neutral because they apply to all paid-for advertisements regardless of content. Moreover, as discussed below, they serve substantial governmental interests.

Indeed, the only First Amendment interest involved in these complaints at all is "the right of the public to be informed rather than the right on the part of the government, any broadcast licensee, or any individual member of the public to broadcast his own particular views on any matter."[24] Broadcasters have no First Amendment interest at stake because they are not expressing their own views or exercising editorial functions when they air paid political advertisements. Nor do broadcasters have any First Amendment interest in not disclosing the true identity of the sponsor.

In *McConnell v. FEC*, the Court upheld the Bipartisan Campaign Reform Act's ("BCRA's") requirement that corporations, unions and individuals who collect contributions from others, identify all persons who contributed $1,000 or more. The Court upheld this requirement, agreeing with the District Court that requiring disclosure of these contributors was

[23] Letter at 1.
[24] *See, e.g., CBS v. DNC*, 412 U.S. 94, 112-13 (1973).

necessary "so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections."[25] The Court also agreed that "uninhibited, robust, and wide-open" speech cannot occur "when organizations hide themselves from the scrutiny of the voting public."[26]

Moreover, the Court explicitly rejected NAB's argument that BCRA's reporting requirements were unconstitutional because they imposed onerous burdens on broadcasters. Noting that BCRA's requirements were virtually identical to those already contained in FCC rules, the Court found that "broadcaster recordkeeping requirements 'simply run with the territory.'"[27] The Court identified a number of important governmental and public purposes served by disclosure and observed that "any additional burden that the statute imposes upon interests protected by the First Amendment seems slight compared to the strong enforcement-related interests that it serves."[28] Thus, the Court concluded that the disclosure and record keeping requirement survived facial challenge "under any potentially applicable First Amendment standard."[29]

Although the Court has since found some parts of BCRA unconstitutional, it has consistently upheld disclosure requirements. For example, in McCutcheon v. FEC, the Court found that

> Disclosure requirements are in part "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." They may also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the

[25] *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (quoting and agreeing with the District Court opinion), *overturned on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).
[26] *McConnell*, at 197.
[27] *Id.* at 236 (quoting *Amendment of the Comm'n's "Sponsorship Identification" Rules,* 52 FCC 2d 701, 709 (1975)).
[28] *Id.* at 245.
[29] *Id.*

> light of publicity." Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech.[30]

Thus, the Supreme Court has already struck the First Amendment balance between citizens, broadcasters and advertisers, and concluded that disclosure requirements are an appropriate and constitutional mechanism to "provid[e] the electorate with information' and 'insure that the voters are fully informed' about the person or group who is speaking."[31]

Finally, even assuming for purposes of argument that broadcasters have some First Amendment interest here, the Supreme Court in *Red Lion* found that it is "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[32] Moreover, it is the First Amendment rights of "viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[33]

Therefore, the Bureau erred because there are no First Amendment interests against which to "balance the 'reasonable diligence' obligations."

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[30] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459-60 (2014) (citing *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)).

[31] *Citizens United*, 558 U.S. at 368.

[32] 395 U.S. 367, 390 (1969).

[33] *Id.* (citations omitted). *See also National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526, 532 (2d Cir. 1975); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 478 (2d Cir. 1971).

Request for Relief

For the reasons set forth herein, Campaign Legal Center, Common Cause, and the Sunlight Foundation, respectfully request that the Commission reverse the Bureau's dismissal of their complaints against television stations WJLA and KGW, and address them on the merits. They also request that the Commission clarify that the statutory and regulatory requirement that broadcasters exercise "reasonable diligence" to determine the true sponsor of political advertisements requires more than simply relying on the representations of the entity purchasing the time in situations where the name of the organization does not reasonably inform the public as to who is paying for the message intended to persuade them.

Respectfully submitted,

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Dated: October 2, 2014

CERTIFICATE OF SERVICE

I, Eric Null, hereby certify that copies of the Application for Review by Campaign Legal Center, Common Cause, and the Sunlight Foundation, through their attorneys, the Institute for Public Representation, have been served by first class mail, with courtesy copy by e-mail, this 2nd of October, 2014, on the following persons at the addresses shown below.

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